APPENDIX 3

CASE STUDY 2004

CITED FROM CONSUMER UTILITIES ADVOCACY CENTRE

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Article by Tim Brook

I am aware that as far back as 2005, soon after the *Winters vs Buttigeig (2004)* case came before VCAT in 2004,[1]/[217] CUAC and others had been endeavouring to put pressure on the Victorian Government (DPI, CAV), and the current economic regulator ESC to reconsider these provisions and the consumer detriments caused.

The case cited refers to the bulk hot water provisions that allow retailers claiming ownership of hot water flow meters that measure water volume rather than gas volume or electricity consumption to hold contractually obligated under deemed provisions those receiving hot water services under the mandated terms of their residential essential tenancy leases. The water is delivered to the outlet of the water mains by the water authority. It is then transmitted in water pipes to a communal water tank, where it is communally heated through a single supply point/supply address on common property infrastructure. The water is then transported in water transmission pipes to individual premises occupying multi-tenanted dwellings.

These are not embedded network consumers. Network ownership or operation has nothing at all to do with provision of water supplies. These are recipients of heated water who have no connection point (supply/address point) or energization in the premises that are alleged to be receiving gas or electricity.

The *Gas Industry Act 2001* s46 requires the sale and supply of energy to be delivered to the premises of the party held contractually responsible. A car park or other common property where meters or communal boiler tanks reside are not the premises of the individual held contractually responsible.

The term *supply address* does not have a postal connotation. It is synonymous with *supply point* or energization point and refers to the physical connection of energy to the said premises demonstrating the flow of gas or electricity to those premises.

Note the use of the term embedded may be slightly misplaced here. If no energy is being supplied directly to premises, the end-user is not a recipient of ene3rgy, regardless of network ownership.

The provision of heated water is not synonymous with the provision of energy. Totally different distribution systems are used. The one uses gas service or transmission pipes or electrical lines; the other uses water services pipes reticulated heated water from a communal water tank to the individual premises of utility users occupying multi-tenanted dwellings. In the case cited an energy supplier was endeavouring to extort around ten times the value of energy supplied to renting tenants. The matter was ultimately brought before VCAT under tenancy provisions, leaving the energy supplier without penalty, and the provisions unaddressed. Found at:

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[1] 217 See CUAC September 2005 Quarterly *"Embedded Networks – Disconnected Consumers"* Article by Tim Brook.

This is a good place to explain the difference between gas and electricity customers supplied with energy with a clear connection point, and those without those points, known generally embedded networks though there are no gas networks and strictly the term applies only to electricity. As reported in CUAC's September 2004 Quarterly[2]

"For most electricity and gas customers with a clear connection point, connections to the distribution network occurs via a local retailer or a retailer of choice. However, in some cases, such as caravan parks, retirement villages, shopping centres and high rise apartment buildings, a separate network exists that takes supply from a local network distribution provider and re-supplies gas[3] and electricity through a separate network to customers. This is referred to as an "embedded network[4]"

The operator of an embedded network is exempt from holding a distribution licence and a retail supply licence. The operator of an embedded network is often a body corporate in the case of high rise apartment buildings or operators of nursing home facilities.

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[2] CUAC Quarterly (2004) *"Embedded Networks: Disconnecting Consumers."* Article by Tim Brook, p 11 and 12

[3] Gas is not re-supplied. It is either delivered directly through flow of energy or not. It does not change hands to any network. There are no gas networks. It is not the gas or electricity that is re-sold at all. Energy providers are endeavouring to charge for the alleged heating component of a composite water product from which the heat cannot be measured or separated. No energy is consumed simply because gas is used to change the temperature of the water. The water is not normally owned by energy suppliers. They do not normally have licences from water authorities to on-sell the water, and would be very hard-pushed to show how much individual gas is used to heat the proportion of heated water used. A hot water flow meter measures water volume only, not gas or heat. In Victoria no site readings were believed to be necessary. In Queensland most gas hot water systems are in public housing. Two thirds of those in Victoria are for privately rented property, the other third public housing. It is more common for site reading to occur in South Australia.

[4] The correct use of the term embedded network is in relation to electricity where either network operations or network ownership changes hands from the original distributor to an alternative supplier. It does not apply to gas. The Orders in Council relating to small scale licencing are exclusive to electricity. There are technical and safety issues associated with endeavouring to allow third parties control of gas distributors – this should always be the responsibility of the distributor and carry a licence.

Though there are many similarities between those who are technically embedded customers of electricity and those receiving heated water that may be either gas-fired or heated with an electricity meter. Embedded customers actually receive a flow of energy to their premises for cooking, heating light etc. Those receiving communally heated water receive a composite water product not gas or heat. This consideration is central to determining contract, who the contractual party should be; whether sale or supply of gas or electricity takes place under Sale of Goods acts, and in changes to common law (implied and statutory warranty), as well as within contract law provisions. The Owners Corporation Act 2006 (Vic) determines the responsibilities of OCs. In a case where gas is used merely to heat a communal water tank all charges belong to the Landlord.

The fairest way to iron this out is to charge the Landlord directly for the heat used in heating a communal tank by reading the single gas meter. A landlord may only pass on consumption costs if there is a separate meter for gas.

Non-instantaneous boiler tanks should be banned. Owners Corporations should be assisted to retrofit older buildings. New buildings should supply instantaneous systems and separate meters.

In some other cases, the Minister for Energy and Resources has the power to grant an Exemption Order which exempts the recipient from the Electricity Industry Act 2000. This is often done in the case of shopping complexes and can affect small retailers and domestic residents.

Flats and Apartments and Units

"A general exemption from the requirement to register as a network service provider is also available in dwellings where groups of individuals share common walls and gas [5]and/or electricity is reticulated as part of the building infrastructure. This is common where groups of individual dwellings are on a common or shared title."

"In many high rise apartments, gas and electricity is made available on terms negotiated as part of the purchase or hiring arrangement."

In such a case most tenants sign up to this agreement as though it were part of the lease without realizing they have the right to a retailer of choice.

The same article discusses the plight of those in Caravan Parks. In this situation, the individual site occupier has contracted with the caravan park operator to receive a supply of energy as part of the rental and therefore has no choice of retailers.

In article goes on to discuss the complete lack of consumer protection for those using an embedded network distribution system, which the DPI sees fit to exemption.

This is because

"…an embedded network is not owned, operated or controlled by a distributor licensed by the Essential Services Commission (ESC) the normal rules and regulations regarding price controls and other terms and conditions that are spelt out in the Retail Code are not available to customers within the embedded network.

This means that the normal avenue of dispute resolution between retailers and customers provided through the Energy and Water Ombudsman Victoria (EWOV) is not available. Customers in this situation are not afforded the right to choose a retailer.

Where a retailer of choice is available, the article explains that

"…tenants and residents often mistake the retail offer made by the body corporate as a normal part of the lease arrangement."

"This is passed back to Owners', presumably through lower body corporate fees. Owner-occupiers are also disadvantaged under these arrangements as professional body corporate entities (now known as Owners' Corporations) and developers are able to extract high ongoing income streams from their buildings."

In the case of those in caravan parks, high rise apartments, retirement villages and nursing homes in complete absence of normal consumer protections.

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[5] Gas is never reticulated except directly. No gas is reticulated to individuals receiving heated water. They receive water only in water service pipes.

"The loophole in existing regulations first became an issue in May 2004 when the Department of Infrastructure wrote a letter to the ESC asking them to review the billing arrangements for bulk gas hot water systems for residents living in multi tenanted dwelling buildings, where water is heated by one central installation and used by multiple apartments and residents.

The issue at that point revolved around the "conversion factors" used by the retailers to charge for bulk hot water services to apartments."

Since then it has become apparent that the conversion factor issue was of small concern compared with the current issue, whereby retailers sell bulk hot water to an unlicensed, unregulated *"billing agent"* employed directly by the body corporate who then on-sells' the energy at an inflated price.

The CUAC article referred to goes on to cite the example of a tribunal case before VCAT in 2005 *(Winter vs Buttigieg)*

"The rise of ulicensed businesses being contracted as 'billing agents' by body corporate entities[6] *and charging well above (up to ten times) the regulated prices for electricity and gas was brought before VTAC in December 2004. In this case (Winter v Buttigieg) the tenants objected to a hot water bill of $452 for an 8month period. The Docklands apartment block in question has a gas hot water system but each individual apartment is not separately metered for gas supply (see 'Advice for Consumers')*

In that case, the article reports that

"In the Winter case the body corporate was using EnergyPlus (Australia) Pty Ltd as the billing agent for electricity and hot water services. VCAT rules that the tenants were only liable for $69 (for hot water) and not the $452 they were charged by the body corporate through Energy Plus.

Because the embedded network in question was exempt from regulation, *Winter* had to rely on a part of the *Residential Tenancies Act 1997* (Victoria) to declare that the charges were unfair.

"The Winter case raised the issue for many people in similar circumstances and the Victorian Government is now under pressure – from groups such as the CUAC and the Tenants Union of Victoria to rectify the situation."

The only circumstance in which arrangements in place are sanctioned by the *Residential Tenancies Act 1997* is one where the Owners' Corporation (previously body corporate entity) is the Department of Human Services or delegate. In these circumstances (Option 2 of the Bulk Hot Water Arrangements) an agreed fixed price is reached between the Owners' Corporation (DHS or delegate) and the energy supplier for say, high rise apartment blocks. The Owners' Corporation in such a case is allowed to charge a service fee to incorporate other service charges like laundry use and the like.

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[6] Now known as Owners' Corporations – refer to the *Owners Corporation Act 2006*

Because the rental prices are highly subsidized in such circumstances, it is deemed acceptable to have a service charge that includes a proportion of the overall bulk hot water heating costs, which is then added to the rent. In no other circumstances is this made an option under tenancy laws, which are similar in all States.

The site specific reading option was rejected on the grounds of cost and inconvenience, but the proper contractual party was the Owners' Corporation not the end-user despite the provisions finally adopted, allowing the use of algorithm calculation.

CUAC had been led to believe that

The Minster of Energy ESC and Consumer Affairs Victoria (were) seeking clarification on the situation with a view to some reforms.

Nothing has happened to change things since 2004. The provisions are still in place, elevated from a Guideline to an Energy Code, and discrepantly operating in different jurisdictions. No-site reading was mandated in Victoria as it was alleged that it would be too expensive and would occasion alleged price shock to end-consumers.

There have been no impacts n rent hikes which have continued regardless. If anything costs are higher since end-consumers who receive no flow of energy to their residential premises pay for water meter reading fees (whilst it is gas they are charged for either in cents per litre (Queensland) or both cents/lire and cents/megajoule. Neither calculation is based on legally traceable measurement and apportionment of gas, but rather is a "gas or "electricity rte" which the SEC refers to as "delivery of gas bulk hot water and "deliver of electricity bulk hot water" two meaningless terms coupled with another classic "energy is consumed when the energy is used to produce another commodity – heated water).

No such consumption or sale and supply ever takes place. This raises the most fundamental issues of contract, misinterpretation of sale and supply of gas, misinterpretation of deemed provisions for sale and supply of energy; conditions precedent and subsequent including demands for access to hot water flow meters normally behind locked doors and in the care and custody of the Controller of Premises normally the Owners Corporation.

A Free Retail Competition fee is charged even if a residential tenant unable to use gas for cooking or heating for safety reasons (naked flame), and even though no form of involvement in competition or choice is possible in what appears to be a hybrid monopoly unregulated market. This defies competition policies national and jurisdictional relating to regulation of either government or non-government monopoly.

The visible change as the direct consequence of bringing this complaint before the EWOV, the CAV, and the DPI was possibly the revision of the Memorandum of Understanding between the CAV and the ESC.

However, the offending policies have not altered, and despite expiration of the provisions under s 42-46 of the *Gas Industry Act 2001,* retailers are continuing to impose unilaterally deemed contracts on end-consumers. Where the deemed provisions were originally intended in consumer protection, they are now being creatively used to improperly and unjustly not only impose unreasonable contractual obligations, but also to impose consumption and supply charges on innocent residential tenants who are end-users of bulk energy, that properly belong to Owners' Corporation entities.

It is one thing for Owners' to come to some arrangement to share common property costs, and quite another to impose these costs on residential tenants, whose standard leases include the supply of water hot and cold, unless utility consumption can be measured with an instrument designed for the purpose and thus individually calculated and apportioned in an appropriate manner.

Using phrases such as *"your hot water consumption is being individually monitored"* firstly implies that the supplier has a licence to sell water products; secondly that the heating component can be lawfully calculated with an instrument designed for the purpose, as is explicitly and implicitly expected with energy legislation (see for example the *Gas Industry Act 2001* (Victoria) and mirrored provisions within the Gas Distribution Systems Code.

At the time, CUAC was aiming to

"…attempt to ensure that protections under Residential Tenancies Act were not diluted in favour of body corporate entity as this would see a number of exempted networks increase markedly."

That was in 2004. It is now 2010. This matter has not been satisfactorily addressed by any regulatory authority all of which seem to have turned a blind eye to the consumer detriments involved.

Although the Tenants' Union of Victoria (TUV) has successfully brought these cases before VCAT for cost recovery purposes only under s55 of the RTA, this is a pragmatic solution that creates an artificial conflict with the landlord (or Owners' Corporation) without addressing the conduct issues for which the supplier, contractor and/or agent is directly responsible; without addressing the contractual obligations other than perceived monetary obligations that are unjustly and unfairly imposed on end-users (for example provision of safe, unhindered and convenient access to meters in the care custody and control of Owners' Corporation and outside the control of the residential tenant to deliver; and without addressing any of the systemic and flawed regulatory issues that in the first place have created the problem.

In addition, cost recovery recourses unjustly impose the obligation to regularly reclaim outlays from the landlord and if unsuccessful after 28 days of making such a claim, repeated appearances before VCAT with ongoing filing fees which offset the cost of recovery.

These considerations render the provisions themselves unfair and unjust with recourse being extremely difficult to achieve, since there are inadequate protections and redress against flawed regulatory policy, if such exist at all.

However, the *Owners' Corporation Act 2006* may have made some difference in general terms. It deems common property infrastructure to be Owners' Corporation responsibility. The revised Memorandum of Understanding between prescribed authorities, in the case of Victoria, between Consumer Affairs Victoria and the Essential Services Commission at least in principle recognizes the need to ensure no conflict between regulatory schemes when designing policy provisions.

Energy regulations have not caught up with those provisions, nor have policy makers or regulators seen fit over numbers of years to proactively address the issue by ensuring proper practice. The existing bulk hot water billing and charging arrangements, which became effective on 1 March 2006 appear to strip consumers of their rightful access to provisions under these and other provisions in the written and unwritten law.

Those living in multi-tenanted dwellings are not able to choose their retailer for the provision of gas for the purpose of their bulk hot water, since most of those living in such apartments are not individually metered for the gas used to heat water.

CUAC and CALV continue to below that all customers should have equal access to the complaints scheme, EWOV and the normal protections offered for gas and electricity consumers in Victoria.

Where providers are middlemen with network distribution, there are no protections at all as these parties are not covered by energy regulations and do not have to belong to the energy complaints scheme.

These leaves it open to all sorts of "billing agents" selling energy without licences or proper accountability. Therefore the question of mandatory licencing of energy providers and some control over regulator or policy-maker "discretion" to grant exemption from such should be written into the Law. The energy area is one where licence exemption is just not a suitable option.

This is another reason to carefully consider retraction of licencing provisions by way of lightening the regulatory burden. In the energy area, it should be allowable to sell energy without a licence, regardless of which network is being used.

The Energy Retail Code states that a retailer must issue bills to a customer for the charging of energy used in the delivery of bulk hot water in accordance with the *Energy Industry Guideline No 20 – Bulk Hot Water Charging Guidelines.*